Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1808

In the Supreme Court of the United States

OCTOBER TERM, 1988

TERCO, INC., PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that substantial evidence supports the decision of the Federal Mine Safety and Health Review Commission that petitioner is a successor employer and therefore liable, under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), to remedy its predecessor's retaliatory discharge of an employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50-57) is reported at 839 F.2d 236. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. 32-49) is reported at 9 F.M.S.H.R.C. 394. The decisions of the administrative law judge (Pet. App. 1-21, 22-31) are reported at 8 F.M.S.H.R.C. 208 and 216, respectively.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1987. A petition for reconsideration was denied on January 6, 1988 (Pet. App. 58). The petition for a writ of certiorari was filed on April 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Terco, Inc., is the operator of a coal mine in Knox County, Kentucky, that was formerly operated by Sugartree Corporation (Sugartree). In July of 1984, at a time when Sugartree still operated the mine, the Secretary of Labor (the Secretary) received a complaint from three miners—James Corbin, Robert Corbin, and A.C. Taylor—alleging that, contrary to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), they had been unlawfully discharged in retaliation for complaining to Sugartree's managers about excessive dust levels in the mine. Pet. App. 12, 15, 51-54.[1]

On September 27, 1984, a Department of Labor administrative law judge (ALJ) ordered Sugartree to reinstate the discharged miners temporarily pending an adjudication of the merits of the complaint (Pet. App. 54). That same day, however, Sugartree ceased operations at the mine (*id.* at 13, 54). A week later, petitioner began operating the mine using many of the same principals, supervisors and employees (*id.* at 13, 17-18, 56). On December 27, 1984, the Secretary filed an administrative complaint against Sugartree alleging that the company had discriminated against the three miners (*id.* at 37). Thereafter, when it became apparent that Sugartree had ceased all mining activity and no longer held any assets, the Secretary amended the complaint to include petitioner as a successor to Sugartree (*id.* at 13-14).

The basic facts regarding the relationship between petitioner and Sugartree are undisputed. To begin with, the companies shared corporate officers. Legal identity forms

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[1] Section 105(c)(1) prohibits discrimination against a miner based on the filing of "a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * *."

submitted by Sugartree (in July 1984) and by petitioner (in September 1984) listed Randal Lawson as president and Carol McCreary as secretary-treasurer of both companies (Pet. App. 44). In addition, Terry McCreary, petitioner's owner and subsequent president, had been the vice-president of Sugartree and received a salary from that company (*id.* at 37, 53).

Petitioner also employed many of Sugartree's former employees and, to the extent possible, used the equipment and machinery formerly used by Sugartree (Pet. App. 17-18, 56-57). Thirteen of 15 employees hired by petitioner in July 1984 for the mine previously operated by Sugartree were former Sugartree employees, and approximately 50% of petitioner's total work force had worked for Sugartree, including Sugartree's mine superintendent and section foreman (*id.* at 46, 56). From the standpoint of the employees, there was no noticeable change in employers; they were not issued layoff slips, but were informed by Lawson in September 1984 that Sugartree was out of business (*id.* at 16, 54).

Before ceasing operations, Sugartree mined the left side of the mine, using the so-called "continuous mining method" (Pet. App. 17-18, 54). Sugartree had also been considering mining the other side of the mine, using explosives to extract the coal (*id.* at 54), and it had approached the three later-discharged miners about their experience with the so-called "shooting from the solid" mining technique (*id.* at 57). When petitioner commenced operations at the same mine, if followed that course, "shooting from the solid" on the right side of the mine (*id.* at 17). No change in personnel was required to effect this change in methods (*id.* at 18, 46).

2. On December 10, 1985, an ALJ determined that Sugartree and Randal Lawson, its owner and president, had unlawfully discriminated against the complainants

when it discharged them following their complaints concerning severe dust conditions at the mine (Pet. App. 12-13). Applying the nine-factor test of successorship enunciated in *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974), and adopted by the Federal Mine Safety and Health Review Commission (the Commission) in *Munsey* v. *Smitty Baker Coal Co.*, 2 F.M.S.H.R.C. 3463 (1980), aff'd in relevant part and rev'd in part on other grounds, 701 F.2d 976 (D.C. Cir.), cert. denied, 464 U.S. 851 (1983), the ALJ further concluded that petitioner was a successor corporation to Sugartree (Pet. App. 14-18). Specifically, the ALJ found that because Lawson was "the perpetrator of what he should have known was a violation of the Act," as well as the president and agent of both Sugartree and petitioner, petitioner had notice of the discrimination charges (*id.* at 15-16). The ALJ also found that there was "a substantial continuity of business operations" insofar as petitioner "continued to mine coal from essentially the same mine as Sugartree using substantially the same workforce and supervisory personnel" (*id.* at 16-18). The ALJ therefore ordered petitioner to reinstate the miners and held petitioner jointly and severally liable with Sugartree for back pay and civil penalties arising out of the unlawful discharges (*id.* at 19-21).

Petitioner sought review by the Commission of the ALJ's successorship determination. Applying the test enunciated in *Munsey* v. *MacMillan Bloedel, supra,* the Commission affirmed the ALJ's ruling that petitioner "is a successor business entity to Sugartree jointly and severally liable for remedying the illegal acts of discrimination committed by Sugartree and Lawson" (Pet. App. 48). The Commission expressly rejected petitioner's argument that only a successor who purchases the assets and stock of its

predecessor can be held liable (*id.* at 47-48). Because two of the complainants had settled their cases (see *id.* at 39 n.3), the Commission directed petitioner to comply with the ALJ's order awarding damages to the remaining complainant (*id.* at 48-49).

3. The court of appeals affirmed (Pet. App. 50-57). It agreed with the Commission that the evidence presented satisfied each of the nine factors identified in *MacMillan Bloedel* as relevant to consideration of successorship status (*id.* at 56). With respect to what it called the "most important" factor, the court noted that "there was a substantial and obvious continuity of business operations between [petitioner] and Sugartree," inasmuch as (i) a large portion of petitioner's work force was composed of former Sugartree employees; (ii) petitioner began operating the mine only one week after Sugartree ceased operations; and (iii) the change in mining procedures undertaken by petitioner "would have taken place even if Sugartree had continued to operate the mine" (*id.* at 56-57). Regarding the remaining factors, the court indicated that petitioner "clearly had notice" of the charges since "there was a complete identity of corporate officers and Lawson, as president, was the one responsible for the discharges;" that Sugartree "was left as a hollow shell and had no capacity to provide the relief ordered by the Commission;" that "the mining jobs under [petitioner] existed under substantially the same conditions as they did at Sugartree;" that despite a change in mining methods, "the same personnel could be employed," and petitioner "continued to use the same equipment and machinery used by Sugartree to the extent possible;" and that "[c]oal production was the business of both companies" (*ibid.*).

The court rejected petitioner's argument that because it did not actually purchase Sugartree's business, it should not be considered a successor. The court explained that "[a]lthough a sale or lack thereof is certainly one of the

factors to which a court can look, it is not in and of itself determinative" (Pet. App. 57). Indeed, the court concluded that "here, the lack of a sale may actually indicate that the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary" (*ibid.*).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's argument that it is not a successor is based largely on its disagreement with the ALJ's factual findings, which were affirmed by both the Commission and the court of appeals. Review by this Court is therefore not warranted.

1. The determination whether a new employer is a successor to the former employer "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15. "[T]he real question * * * is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?" *Howard Johnson Co.* v. *Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union*, 417 U.S. 249, 262 n.9 (1974). And "[t]he answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue" (*id.* at 263 n.9).

As petitioner acknowledges (Pet. 17), the courts consider a number of factors in determining successorship. These include:

> 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide

> relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

EEOC v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

In the present case, the ALJ, after applying the nine-factor analysis, found that each of these elements had been met (Pet. App. 14-18). That finding was sustained by both the Commission (*id.* at 43-47) and the court of appeals (*id.* at 56-57).

Petitioner disputes the findings of the ALJ with respect to several of these factors. However, because the ALJ's findings against petitioner were upheld by the Commission and the court of appeals, there is plainly no justification for review by this Court. Cf. *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967) (citation omitted) (noting that the Court will not " 'review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error' "). In any event, the ALJ's findings were correct. For example, the conclusion that petitioner had notice of the charge against its predecessor followed from the undisputed evidence that Lawson, the Sugartree officer responsible for the discharges, was also president of petitioner (Pet. App. 56). Moreover, as to the continuity of business operations, the Commission and the court below specifically noted that 13 of 15 employees hired by petitioner in July 1984 for the mine previously

operated by Sugartree were formerly employed by Sugartree; that approximately 50% of petitioner's total work force had worked for Sugartree; that petitioner resumed operations at the same mine only one week after Sugartee ceased operations; and that the changes in mining procedures instituted by petitioner had been contemplated and would have been undertaken by Sugartree, had it continued operating the mine (*id.* at 44-47, 56-57).

2. Petitioner further maintains (Pet. 12-16) that because there was no finding that it had purchased or leased assets from Sugartree, the finding of successorship here is contrary to this Court's decision in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973). According to petitioner (Pet. 16), "a court cannot even reach the nine step analysis * * * to determine successorship unless a purchase or at least a lease of assets has occurred." Petitioner also asserts (*id.* at 15) that the circuit court decisions upholding findings of successorship "invariably deal with situations in which the 'successor' had leased or purchased the assets of its predecessor * * *." These assertions are simply incorrect.

In *Golden State Bottling Co.*, this Court declined to adopt a hard-and-fast rule concerning the nature of the transaction that may lead to successorship liability in the labor law context. As the Court explained, "[t]he refusal to adopt a mode of analysis requiring the [NLRB] to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application" (414 U.S. at 183 n.5 (citation omitted)). To be sure, there was a transfer of assets in *Golden State Bottling Co.* But this Court has also sustained findings of successorship in circumstances that did not involve asset transfers. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272,

280-281 & n.4 (1972). Moreover, contrary to petitioner's assertion (Pet. 15), other courts of appeals that have considered the question have agreed with the court below that a transfer of assets is not an essential prerequisite to a finding of successorship. See, *e.g.*, *Saks & Co.* v. *NLRB*, 634 F.2d 681, 687 (2d Cir. 1980) ("[W]hile a transfer of assets may be evidence of the requisite continuity of business operations, it has not been thought to be a necessary condition * * *."); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1027-1028 (7th Cir. 1969).

Petitioner maintains (Pet. 13-14) that because it did not purchase any assets from Sugartree, it did not benefit from Sugartree's discriminatory practices. However, where, as here, there is a continuity in the work force, failure to remedy unfair practices has a chilling effect on the exercise of the employees' guaranteed rights which inures to the benefit of the successor employer. Cf. *Golden State Bottling Co.*, 414 U.S. at 184.

Nor is there any merit to the suggestion (Pet. 13-14) that because there was no formal purchase of assets, petitioner could not protect itself against potential liability for Sugartree's discriminatory practices by means of an indemnity clause or a price adjustment for the assets purchased. As the court below recognized (Pet. App. 57), the facts of this case reflect that "the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60539